No. 95-1016

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1995

KATHLEEN QUICK,

Petitioner,

vs.

NATIONAL AUTO CREDIT, INC. f/k/a AGENCY RENT-A-CAR, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONSE OF RESPONDENT NATIONAL AUTO CREDIT, INC. IN OPPOSITION TO MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE OUT-OF-TIME BRIEF

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Respondent, National Auto Credit, Inc., formerly known as Agency Rent-A-Car, Inc., hereby opposes the Motion of Kendrick Wilhite for Leave to File *Amicus Curiae* Brief in support of the Petition for Certiorari. The Court should deny the motion for the following reasons.

ARGUMENT

I.

THE MOTION AND THE *AMICUS CURIAE* BRIEF ARE UNTIMELY.

Rule 37.2 required movant's motion and *amicus curiae* brief to be filed "within the time allowed for filing a brief in opposition to the petition for a writ of certiorari." Respondent's brief in opposition was due (and was filed) on January 25, 1996. Movant did not file his motion and *amicus curiae* brief until February 2, 1996. The motion and brief therefore are untimely, and the motion for leave to file the *amicus curiae* brief should be denied.

II.

THE MOTION AND *AMICUS CURIAE* BRIEF ARE A SUBTERFUGE FOR INTERVENTION, WHICH WAS CORRECTLY DENIED BY THE EIGHTH CIRCUIT.

The movant attempted to intervene in this case — *after judgment* — in the court below. (Motion to Intervene, filed September 26, 1995.) The Eighth Circuit correctly denied the motion to intervene. (Order, filed October 13, 1995.) *Cf. Paisley v. C.I.A.*, 724 F.2d 201, 203 (D.C. Cir. 1984). The movant has not sought review of the Eighth Circuit's denial of his motion to intervene in this Court. Instead, he seeks to file an *amicus brief* as a subterfuge for intervention. Consequently, his motion should be denied.

III.

THE *RES JUDICATA* OR *STARE DECISIS* EFFECTS ON MOVANT OF THE EIGHTH CIRCUIT'S DECISION ARE NOT BEFORE THE COURT IN THE PRESENT CASE.

The first question presented by the movant's *amicus curiae* brief is the *res judicata* or *stare decisis* effects on movant of the Eighth Circuit's decision. The movant asserts that he would be denied due process if the Eighth Circuit's decision is accorded *res judicata* or *stare decisis* effects in the event he brings a claim which the Eighth Circuit held in this case does not exist under Missouri law because he was not a party in this action.

Since the movant has brought no such claim, and has had no such claim barred by the *res judicata* or *stare decisis* effects of the Eighth Circuit's decision, there is no case or controversy, and this issue is simply speculative and not ripe for adjudication; it is more in the nature of a request for an advisory opinion. *See G. & C. Merriam Co. v. Saalfield*, 241 U.S. 22, 29 (1916); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, n.5 (1979). Furthermore, as discussed under point 5 below, movant was in privity with the plaintiff below and was represented by her.

IV.

THE ISSUE OF THE ASSIGNABILITY OF A TORT CLAIM UNDER MISSOURI LAW IS ALREADY BEFORE THE COURT IN THE PETITION FOR CERTIORARI.

The second question presented by the movant's *amicus curiae* brief — the assignability of a tort claim under Missouri law — is already before the Court in the Petition for Certiorari. (Pet. at i, no. 4). As a result, the *amicus curiae* brief is merely repetitive, and the motion for leave to file it should be denied.

V.

MOVANT'S PROPOSED *AMICUS CURIAE* BRIEF DOES NOT PRESENT A SERIOUS QUESTION.

Movant's entire argument is based on the premise that he was not a party to this case. As movant admits, however, he assigned his claims to the petitioner herein — the plaintiff in the district court. (Proposed *Amicus Curiae* Br. at 2.) Consequently, he was in privity with the plaintiff in this case, was represented by her, and is bound by the judgment below. *See Chicago, R.I.P. Ry. Co. v. Schendel*, 270 U.S. 611 (1926); *Chicago Life Ins. Co. v. Cherry*, 244 U.S. 25 (1917); *United States v. New York Terminal Warehouse Co.*, 233 F.2d 238, 240-41 (5th Cir. 1956); *LeDuc v. Normal Park Presbyterian Church*, 142 F.2d 105, 107 (7th Cir.), *cert. denied*, 323 U.S. 729 (1944). The application of *res judicata* in these circumstances does not raise a constitutional issue. *See Parklane Hosiery Co.*, 439 U.S. at 326-33. Accordingly, movant's proposed *amicus curiae* brief does not present a serious question to be decided by the Court.

CONCLUSION

For the foregoing reasons, the motion of *amicus curiae* for leave to file his brief should be denied.

Respectfully submitted,

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